No. 05-381

IN THE
Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE BUSINESS ROUNDTABLE AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

***CASES*:**

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

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STATEMENT OF INTEREST

Amicus curiae Business Roundtable is an association of approximately 160 chief executive officers of leading corporations with a combined workforce of more than ten million employees in the United States and about $4.5 trillion in revenues.[1] The executives who created Business

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members, made a monetary contribution to the preparation or

Roundtable believed that one way business could be a more constructive force and have a greater impact on policymaking was to bring the chief executive officers of major corporations more directly into public debate. The Business Roundtable's members examine public policy issues that affect the economy and develop positions that seek to reflect sound economic and social principles.

Amicus curiae National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing in America's economic future and living standards.

Amici have participated in numerous cases before this Court, including cases involving antitrust issues. *See, e.g.*, *Volvo Trucks North Am., Inc.* v. *Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006) (NAM); *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004) (Business Roundtable); *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997) (Business Roundtable and NAM). *Amici* filed a brief in support of the petition for certiorari in this case.

Amici have a strong interest in this case because the question presented has enormous practical importance for their members nationwide. *Amici*'s members have relied on the standards for "predatory pricing" set forth in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) for all pricing decisions—including decisions

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submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk. Petitioner is a member of Business Roundtable and NAM.

related to selling goods and those related to purchasing inputs. The Ninth Circuit in this case, however, refused to apply the *Brooke Group* standards to a predatory pricing claim because the claim involved alleged predation in the price Weyerhaeuser paid for raw materials rather than the price it charged consumers. As a result, Weyerhaeuser was held liable for treble damages under the Sherman Act based on a jury's subjective finding that the company had purchased more inputs "than it needed" or paid more "than necessary" for them. Pet. App. 7a n.8. That open-ended inquiry is unmanageable for corporate executives and courts alike, and it will deter efficient purchasing decisions in the marketplace—all to the ultimate detriment of consumers.

The Ninth Circuit's departure from *Brooke Group* threatens the stability and predictability that is essential to productive economic enterprise. *Amici*'s members regularly engage in price negotiations and decisions at each stage of the production process—all with an eye toward maintaining efficiency and engaging in the vigorous competition that benefits consumers. The Ninth Circuit's ruling, which subjects companies to an unknowable risk of treble damages resulting from efficient and commonplace purchasing decisions, should be reversed.

SUMMARY OF ARGUMENT

The Sherman Act is "the Magna Carta of free enterprise," guaranteeing to every business "the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). The liability standards for predatory pricing that this Court established in *Brooke Group* protect a business's freedom to compete—and even to compete aggressively—against its rivals.

The Ninth Circuit, however, sharply curtailed that freedom when it refused to apply *Brooke Group* to allegedly predatory *bidding*. The court of appeals instead adopted loose and subjective standards (Were the purchases really "necessary"? Was the bid price "fair"?) that threaten to subject routine business purchasing decisions to judicial oversight, and potentially treble damages, depending on what a lay jury concludes was "necessary" or "fair." Pet. App. 7a n.8.

Brooke Group's liability standard should apply to all allegations of predation—whether the conduct challenged is on the buying or selling side of a business plan. Clarifying that *Brooke Group*'s two prerequisites apply to purchases of inputs as well as to sales of finished products will allow companies to make efficient purchasing decisions and to adjust to rapidly-evolving market conditions. It will ensure that firms have the flexibility to determine and adjust their prices—up or down—to accommodate changing economic conditions. If allowed to stand, the decision below will disrupt efficient market behavior nationwide, encourage inefficiency, and discourage innovation—by forcing a more efficient firm to alter its own pricing decisions to ensure that a less efficient rival is able to perpetuate itself in business. Subjecting pricing decisions to the whim of juries applying a vague "fairness" test—as occurred below—would deter economically beneficial behavior and disrupt the efficient allocation of resources that results from those price signals. The Ninth Circuit's decision should be reversed.

ARGUMENT

BROOKE GROUP PROVIDES THE PROPER STANDARD FOR ANALYZING A CLAIM OF PREDATORY PRICING IN THE PURCHASE OF RAW MATERIALS.

A firm's conduct can be fairly characterized as predatory—and therefore anticompetitive—if the firm is " 'attempting to exclude rivals on some basis other than efficiency.' " *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (quoting Robert H. Bork, *The Antitrust Paradox* 138 (1978)). Conduct that excludes rivals simply because a firm is more efficient, however, constitutes aggressive competition rather than unlawful predation. This Court has long recognized that a clear distinction between these two scenarios is necessary to avoid "deter[ring] procompetitive conduct." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 593 (1986). To avoid such deterrence, the Court provided a transparent and objective way to distinguish between the two in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

The *Brooke Group* standard imposes two prerequisites for a finding of predatory pricing. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Id*. at 222. The Court required below-cost pricing because it rejected "the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws." *Id*. at 223. And second, a plaintiff must demonstrate "that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." *Id*. at 224.[2] If after analyzing "both the scheme alleged by the plaintiff and the structure and conditions of the relevant market," it appears that recoupment of the defendant's losses from its below-cost pricing is not a dangerous probability, then "the plaintiff's case has failed." *Id.* at 226.

Brooke Group thus tells us how to recognize when conduct has crossed the line from robust competition to predation and anticompetitiveness: below-cost pricing together with a

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[2] Although *Brooke Group* involved a claim under the Robinson-Patman Act, the Court made clear that the "two prerequisites to recovery remain the same" under Section 2 of the Sherman Act. *Id*. at 222.

dangerous probability of recoupment. *Id.* at 222-224. Predation is behavior that appears economically irrational in the short term—because a firm incurs losses—but is made rational over the longer term—because the firm recoups more than the initial losses it suffered. Courts and corporate executives alike have understood and followed this clear standard, and it has provided an objective basis for ferreting out competition on the merits from predation. It allows for the essence of aggressive competition—a company's use of its greater efficiency to increase market share—without chilling procompetitive conduct.

The requirements for predation articulated in *Brooke Group* apply with equal force to allegations of predatory pricing in purchasing inputs as in selling finished goods. The same underlying concerns with protecting competition and allowing a firm to use its greater efficiency to gain a competitive advantage exist in both scenarios and compel application of the same standard to both.

A. The *Brooke Group* Standard Imposes Liability Only When Unilateral Pricing Decisions Merit An Anticompetitive Inference.

This Court has repeatedly made clear that businesses are entitled—indeed, encouraged—to engage in above-cost competition without fear that those procompetitive actions will subject them to antitrust liability: "[T]he antitrust laws * * * were enacted for 'the protection of *competition* not *competitors*.' " *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)). The Sherman Act does not seek "to protect businesses from the working of the market." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458 (1993). It "directs itself * * * against conduct which unfairly tends to destroy competition itself." *Id.* The Sherman Act accordingly seeks to promote economic efficiency and competition as a whole; it is indifferent to complaints that less efficient companies have a lower profit margin or a higher cost structure and therefore a lesser ability to participate in vigorous competition.

It is entirely consistent with the promotion of robust and vigorous competition in the marketplace that firms that operate less efficiently may go out of business. That is why the Court in *Brooke Group* refused to condemn *above*-cost pricing; any exclusionary effect stemming from above-cost pricing "either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Group*, 509 U.S. at 223. *Brooke Group*'s line of demarcation represents the Court's commitment to the principle that the antitrust laws are not to be used to shield less efficient players from market forces. *See* Richard A. Posner, *Antitrust Law* 196 (2d ed. 2001) ("It would be absurd to require the firm to hold a price umbrella over less efficient entrants."); Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 709-711 (1975) (predation rules should only protect equally efficient competitors).

The *Brooke Group* standard is a "high" one, as the Ninth Circuit repeatedly noted (Pet. App. 7a, 8a, 11a, 15a),[3] for good reason: "Competitive and exclusionary conduct look alike." Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 972 (1986). The objective *Brooke Group* standard minimizes the danger of confusing the two types of conduct and thereby chilling procompetitive conduct. *See Copperweld Corp.* v. *Indepen-*

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[3] *Brooke Group* itself notes that the two prerequisites to recovery on a predatory pricing claim—which it termed the "essential components of real market injury"—"are not easy to establish." 509 U.S. at 226.

dence Tube Corp., 467 U.S. 752, 767-768 (1984) (recognizing that it is "difficult to distinguish robust competition from conduct with long-run anticompetitive effects").

The Court reiterated its understanding of the dangers of false positives just recently. "Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.' " *Verizon Comm'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (citation omitted). *Brooke Group* provides a "workable definition of exclusionary conduct under § 2 of the Sherman Act" because it "define[s] anticompetitive exclusionary conduct with tolerable accuracy, in particular, without excessive false positives," and because it is "administrable by a court." Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147, 148 (2005). The standard allows for the essence of competition—using efficiency advantages to increase market share—without chilling procompetitive conduct through the threat of false-positive liability findings.

The Ninth Circuit's rejection of the *Brooke Group* standard, and its focus instead on whether a competitor could access the raw materials that it "needed" at a "fair price" (Pet. App. 7a n.8), ignores the economic reality that less efficient firms may falter—and sometimes fail—in the face of vigorous competition on the merits. *See Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 337 (1990) (so long as prices do not reach predatory levels, "the business lost by rivals cannot be viewed as an 'anticompetitive' consequence"). A firm's decision to take advantage of its greater efficiency in making competitive pricing decisions that are "aimed simply at increasing market share" is legitimate market conduct. *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 118 (1986). It is distinct from predatory pricing, which "has as its aim the elimination of competition." *Id.* The proper inquiry, therefore, is not the effect on a specific rival, but whether the conduct "has impaired competition in an unnecessarily restrictive way." *Aspen Skiing Co.*, 472 U.S. at 605.

B. *Brooke Group* Applies Equally To Upstream Price Decisions.

1. This Court has never held that the antitrust laws could subject a firm to liability for above-cost pricing, whether the price be the price paid for inputs or the price charged for outputs.[4] *See generally* Einer Elhauge, *Why Above-Cost Price Cuts To Drive Out Entrants Are Not Predatory—And The Implications for Defining Costs and Market Power*, 112 Yale L.J. 681, 827 (2003) (article "reaffirm[ing] the wisdom of the position that antitrust law should not recognize *any* claim of above-cost predatory pricing") (emphasis added). Indeed, this Court has previously distinguished an above-cost "price-cost squeeze" from predatory pricing. *See Cargill*, 479 U.S. at 114-115. *Cargill* involved allegations that one competitor would "bid up the price" it paid for inputs (there, cattle), while simultaneously reducing the price at which it sold outputs (there, boxed beef). *Id.* at 114. While the Court recognized that rivals would incur a loss in profits by matching those input and output prices, it notably emphasized that the "antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition." *Id.* at 116. The Court explained that price competition—including competition from an above-cost "price-cost squeeze"—was "not predatory activity." *Id.* at 118.

The lower courts have been in near-unanimous agreement (with the exception of the case under review) that above-cost pricing decisions—either upstream or downstream—are not

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[4] It is undisputed that Weyerhaeuser continued to make a profit on finished lumber despite paying prices found to be more than "fair." *See* Pet. 5.

predatory conduct subjecting a company to treble damages under the Sherman Act. *See, e.g.*, *United States* v. *ARM Corp.*, 335 F.3d 1109, 1120 (10th Cir. 2003) (predatory pricing claim failed where it was "uncontested" that company did not price below costs); *Virgin Atlantic Airways Ltd.* v. *British Airways PLC*, 257 F.3d 256, 266 (2d Cir. 2001) ("a business entity is not guilty of predatory conduct through excluding its competitors from the market when it is simply exploiting competitive advantages legitimately available to it" through low, but above-cost pricing); Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 Cornell L. Rev. 1, 9-10 (2005) ("[M]ost judicial opinions and commentators agree that any competitor excluded from a market because of its inferior efficiency has no complaint under the antitrust laws."). Whether the price point is for upstream inputs or downstream outputs, above-cost pricing cannot effectively or reliably be distinguished from competition on the merits.

Application of the *Brooke Group* standard to purchasing decisions reinforces the same underlying principles as does its application to consumer sales—namely, that the antitrust laws cannot be used to insulate less efficient rivals and that the antitrust laws encourage vigorous competition. All price adjustments—including those for input purchases—"up to the point of marginal cost are consistent with competition on merits, since in this case only less efficient firms will be disadvantaged." *California Computer Prods., Inc.* v. *IBM Corp.*, 613 F.2d 727, 743 (9th Cir. 1979).

In this regard, monopsony (buying side power) is analytically the same as monopoly (selling side power), and should be so treated under the law. *See Khan* v. *State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, J.) ("monopsony pricing * * * is analytically the same as monopoly or cartel pricing and so treated by the law") (citing *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948)), *vacated on other grounds*, 522 U.S. 3 (1997); *Vogel* v. *American Soc'y of Appraisers*, 744

F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("monopoly and monopsony are symmetrical distortions of competition from an economic standpoint").[5] The purchase price for inputs only merits an inference of predation if a firm is paying so much for its inputs that it is operating at a loss—and it is undisputed that Weyerhaeuser was *not* operating at a loss. *See* Pet. 5.[6]

The mere desire to increase market share is not anticompetitive; it is the goal of competition. As this Court reiterated just two years ago, "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Law Offices of Curtis V. Trinko*, 540 U.S. at 407. Thus, "to safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Id.*; *see also Ball Mem'l Hosp., Inc.* v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338-39 (7th Cir. 1986) (Easterbrook, J.)

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[5] *See also United Airlines, Inc.* v. *U.S. Bank N.A.*, 406 F.3d 918, 925 (7th Cir. 2005) (the antitrust laws forbid monopsonies and monopolies "on equal terms"); *United States* v. *Syufy Enters.*, 903 F.2d 659, 663 n.4 (9th Cir. 1990) (Kozinski, J.) (" 'Monopsony and monopsony power are the equivalent on the buying side of monopoly and monopoly power on the selling side' ") (citation omitted); Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 Antitrust L.J. 589, 591 (2005) ("[A]symmetric treatment of monopoly and monopsony has no basis in economic analysis.").

[6] The antitrust laws have never been held to require a company to engage in profit maximization. *See, e.g.*, *AMR Corp.*, 335 F.3d at 1118-19; *Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 533 n.14 (5th Cir. 1999); *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 235 (1st Cir. 1983); *see also* Steven C. Salop, *Anticompetitive Overbuying By Power Buyers*, 72 Antitrust L.J. 669, 700 (2005).

(holding that the antitrust laws do not penalize an "intent to do more business"). It is only where increased market share "results from conduct that initially creates losses and which leads to profits only thereafter because it drives competitors from the market, the motives may be considered improper and the conduct may be deemed predatory." 1 American Bar Association, *Antitrust Law Developments* 249 (5th Ed. 2002). The Court's statement in *Brooke Group* about cutting *prices* to increase market share on the *seller* side equally applies to cutting *profits* to increase market share on the *buyer* side: " 'To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices [or profits] in order to increase market share. The antitrust laws require no such perverse result.' " *Brooke Group*, 509 U.S. at 223 (quoting *Cargill*, 479 U.S. at 116).

2. The first prerequisite of the *Brooke Group* standard—below-cost pricing—should apply equally to input purchasing decisions. If a company lowers the costs in its production process through innovation or streamlining, it should be able to apply its costs savings to another part of the production process if it so chooses—including purchasing additional or higher quality raw materials so long as it operates at a profit. No antitrust liability standard should discourage innovation and streamlining in production—which is what the Ninth Circuit's decision accomplishes by disregarding the role of efficiency and cost structure in its analysis.

Brooke Group's second prerequisite—a dangerous probability of recoupment—should also be a prerequisite to claims of predatory pricing in the purchase of raw materials. *See Brooke Group*, 509 U.S. at 226 (below-cost pricing alone does not show injury to competition). During the recoupment period, a company must lower the price paid to suppliers to such a degree that it makes back all it lost and more. This is a far from certain endeavor. If a buyer with market power "depresses too vigorously its suppliers' prices, it will succeed only in eliminating sources of inputs by driving potential suppliers out of the input market." Jack A. Rovner, *Monopsony Power in Health Care Markets: Must the Big Buyer Beware Hard Bargaining?*, 18 Loy. U. Chi. L. J. 857, 865 (1987). And once the input price is lowered, competitors will have every incentive to re-enter the market, especially in markets with low barriers to entry.

Claims that a firm's purchase price for inputs threatens competition must be evaluated with the same care as claims that a firm's sale price threatens competition, because in both circumstances it is " 'inherently uncertain' " that the conduct will benefit the alleged predatory firm. *Cargill*, 479 U.S. at 121 n.17. In both cases, any long-run gain is speculative and "highly uncertain." *Id.* The bright line below-cost-plus-probability-of-recoupment rule takes into account "that the obstacles to the successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous." *Id.*

The *Brooke Group* standard similarly recognizes that economic rationality makes predation a rare and self-deterring behavior. *Brooke Group*, 509 U.S. at 226 ("As we have said in the Sherman Act context, 'predatory pricing schemes are rarely tried, and even more rarely successful,' and the costs of an erroneous finding of liability are high.") (quotation omitted); *Matsushita*, 475 U.S. at 595 ("economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the [predator]"). And in both predatory buying and selling, the cost of false positives outweighs the cost of false negatives; while false negatives are self-correcting over time, there is no market correction for imposing liability on conduct that is actually beneficial. *See* Frank McChesney, *Talking 'Bout My Antitrust Generation: Competition For and*

In the Field of Competition Law, 52 Emory L.J. 1401, 1412-13 (2003).[7]

In both predatory selling and bidding, conduct is only "predatory" such that it permits an inference of anticompetitive intent if a firm is accepting short term losses as part of a plan that is dangerously probable of achieving longer term gains through reduced competition. *Brooke Group*, 509 U.S. at 226; 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 726b, at 304 (2d ed. 2002) (predation "is profitable and thus rational only if the payoff from the future monopoly or oligopoly profits is sufficiently large to 'recoup' the immediate predation investment."). Without a probability of recouping its losses, a predation scheme would not be rational. It would instead be economically senseless. And "[i]f the plaintiff's theory is economically senseless, no reasonable jury could find in its favor." *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 468-469 (1992).

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[7] The decision below incorrectly states that consumers only experience short-term benefits during the predatory period of a predatory *selling* scheme but not a predatory *buying* scheme. *See* Pet. App. 10a. Consumers in fact benefit from lower prices in both instances—just through different mechanisms. When suppliers are paid more for inputs, they will supply more inputs to the extent they are able to. Any time that the price paid for an input is higher, suppliers able to substitute into the production of that input will have an incentive to do so. *See* Roger D. Blair & Jeffrey L. Harrison, *Monopsony* 66-67 (1993). More inputs will result in more finished products for sale to consumers, which will result in lower prices to consumers. *See* Salop, *supra*, 72 Antitrust L.J. at 676. In fact, this is exactly what happened in this case: "From 1998 to 2001, sawlog prices increased while finished lumber prices decreased," so consumers benefited. Pet. App. 3a. Thus, the "predatory" period on both the buying and selling side has the potential to provide short-term benefit to consumers.

3. The *Brooke Group* standards also make practical sense when assessing claims of predatory pricing in the purchase of inputs. Many legitimate business reasons exist for outbidding rival firms to purchase necessary inputs, *especially* if there is a relatively limited supply of inputs, as was the case below.[8] *Amici*'s members routinely make pricing decisions based on such factors as market conditions, business strategies, efficiency concerns, available supply, supplier reputation, and expected growth in customer demand—none of which merits an inference of anticompetitive conduct. For instance, a company might be willing to pay a premium for inputs to preclude future input shortages, reduce or eliminate transaction costs with sellers, reduce variations in inputs by purchasing all inputs available from a smaller number of suppliers, purchase inputs only from more reputable or established suppliers as opposed to less reliable suppliers in the market, or increase the elasticity of a market by encouraging those who might have withheld their goods or those who have equivalent or substitute goods to put them up for sale. Companies also regularly make changes to raw material purchase prices based on inventory policies, increased demand for a firm's products, variations in how risk-averse the company is when purchasing inputs, or to facilitate expansions in capacity, hedge against raw material price increases, or meet competition from a new market entrant. None of these exercises of business judgment should subject a firm to potential treble damages under the Sherman Act.

Similarly, a company might rationally accept a lower per-unit profit by paying more for raw materials if it anticipates being able to sell a higher volume. Or the company might be able to pay more for raw materials because it has lower costs

[8] When the supply of an input is relatively inelastic, how could a firm purchase more of that limited supply except by offering to pay more than its competitors are paying?

than rivals somewhere else in the production chain—such as lower distribution costs, lower personnel costs, or more efficient machinery (such as the indisputably higher-caliber equipment in Weyerhaeuser's facilities, *see* Pet. 3). Companies should not risk antitrust liability for profiting from the development of a faster or less costly production process, or because they incorrectly predicted future demand. *See* Hovenkamp, *supra*, 72 U. Chi. L. Rev. at 160 (explaining that "many practices that raise rivals' costs, such as innovation that either deprives rivals of revenue or forces them to innovate in return, are also welfare enhancing").[9]

C. Applying *Brooke Group* To Purchases Of Raw Materials Protects Efficient Competition; Applying The Ninth Circuit's Rule Protects Inefficient Competitors.

Amici's members have long relied on the clear standards of *Brooke Group* and its predecessors when engaging in one of the central activities of any business: purchasing and selling price decisions. The Ninth Circuit's subjective "fairness" standard will sweep away the predictability, administrability, and transparency upon which businesses depend in making every day decisions, with significant impact on numerous businesses nationwide and numerous everyday business pricing decisions. It will generate great uncertainty in the marketplace, which in turn leads to the risk of chilling competition; businesses abhor unnecessary risks. When faced with issues of above-cost pricing decisions, this Court

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[9] In the sawmill market—like many other markets—a company's choice of production method can influence cost efficiency. *See, e.g.*, Philip H. Steele, *et al.*, *The Value Versus Volume Yield Problem For Live-Sawn Hardwood Sawlogs*, 43 Forest Products J. 35 (1993) (discussing the output differences depending on whether a sawmill chooses a lumber volume or a lumber value maximization when hardwood sawlogs are processed).

has previously recognized general courts' and lay juries' limitations in understanding all of the dynamics of aggressive competition at play; the Court should do so again now.

Businesses need rules that can practicably be implemented on a day-to-day basis. Routine pricing decisions are made by ordinary business people—not by industrial organization economists. These individuals cannot consult economists and lawyers every time a bid for materials is due, a contract is up for renewal, or another of the varied and routine pricing decisions must be made. Pricing decisions are often time sensitive and require the exercise of business acumen and insight; they should not require the participation of economists or lawyers.

The harm that would result from affirming antitrust liability for Weyerhaeuser purchasing more inputs than a jury felt were "needed" and at a higher price than "necessary" is considerable. Reasonable firms confronted with the possibility of treble-damages liability for aggressive purchasing decisions will opt to simply disengage from vigorous competition rather than risk a jury condemning a competitive practice, and rather than hire a cadre of lawyers and economic consultants to justify every new proposed payment to a supplier. In effect, a subjective standard like that in the decision below will increase economic inefficiencies. The *more* inefficient a competitor is, in fact, the *more* an efficient rival must solicitously rein in its own pricing decisions to ensure that its competitor can buy whatever raw materials it needs at whatever price the inefficient competitor deems "fair." In other words, an efficient company with a higher profit margin cannot use that to its advantage if by doing so it would prevent an inefficient competitor with a low profit margin from continuing to remain competitive.

Subjective and open-ended liability rules like the one the Ninth Circuit endorsed here "disrupt the proper functioning of the price-setting mechanism." *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 461-462 (1986) (condemning agreement that causes party to consider "whether a particular purchase is cost justified" because that "is likely enough to disrupt the proper functioning of the price-setting mechanism"). Upholding the Ninth Circuit's decision in this case would impose a considerable burden on businesses, not just by subjecting them to the risk of treble damages, but also by creating the specter of antitrust litigation in each of the routine business decisions that executives and managers make on a daily basis. These costs would eventually be passed on to consumers.

It is imperative that antitrust rules "must be clear enough for lawyers to explain them to clients," and they must be "administratively workable." *Town of Concord, Mass.* v. *Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.). Courts should properly consider in formulating antitrust liability standards "what advice a lawyer, faced with [that] rule, would have to give a client" and whether he would have "to point out the risks of suit—whether ultimately successful or not—by an injured competitor." *Barry Wright*, 724 F.2d at 235 (Breyer, J.). Because of the open-ended nature of the Ninth Circuit's subjective standard, no lawyer or client will be able to predict when a jury might find a company's purchases to be just pennies too expensive to be "fair", or to have included just a few extra sawlogs more than "necessary."

Courts will face similar difficulties in administering the subjective standard endorsed by the Ninth Circuit. Courts and lay juries are ill-equipped to determine what prices are "fair" or how many logs a particular company "needs." *See* Richard J. Pierce, Jr., *Is Post-Chicago Economics Ready for the Courtroom? A Response to Professor Brennan*, 69 Geo. Wash. L. Rev. 1103, 1118-19 (2001) ("identifying [above-cost predation strategies] in the particular case without chilling aggressive, competitive pricing is far beyond the capacity of any antitrust tribunal"). As then-Judge Breyer recognized, once a court asks itself "how is a judge or jury to determine a 'fair price?,' " it becomes clear that courts need rules and remedies "that are easier to administer." *Town of Concord, Mass.*, 915 F.2d at 25.

Brooke Group adequately protects " 'management's exercise of independent business judgment.' " *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (quotation omitted); *see also Klor's, Inc.* v. *Broadway-Hole Stores, Inc.*, 359 U.S. 207, 212 (1959) (criticizing agreements that " 'cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment' ") (quoting *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951)). Firms also must be able to exercise this independent business judgment when purchasing raw materials. The difference between legitimate competition and unlawful predatory conduct already requires "the most subtle of economic judgments about particular business practices." *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000). Inquiries into the "fairness" of prices and the "necessary" levels of purchases by each competitor would wreak havoc on that subtle economic judgment and its predictability.

Only if *Brooke Group*'s objective and administrable prerequisites are applied to all predatory pricing allegations will consumers avoid shouldering the increased costs that come with chilling competition. The standard for predatory conduct is meant to distinguish non-efficiency-based anticompetitive conduct from vigorous competition and the aggressive pursuit of legitimate business objectives. In order to accomplish that task here, the Court should make clear that the standard of *Brooke Group* applies to all predatory pricing claims, including those involving the purchase of inputs.

CONCLUSION

For the foregoing reasons and the reasons in the brief for Petitioner Weyerhaeuser, the judgment below should be reversed.

Respectfully submitted,

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